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Supreme Court of the United States

APRIL TERM, 1963

No. 956

JOHN G. MacMULLEN, PETITIONER,

versus

SOUTH CAROLINA ELECTRIC & GAS COMPANY,
RESPONDENT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondent prays that a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on January 7, 1963, be denied.

By the questions stated in petitioner's application we understand that petitioner seeks a Writ of Certiorari on the grounds that:

1. There is a conflict between the decision of the Court of Appeals and a decision of this Court.

2. There is a conflict between decisions of the Courts of Appeals.

3. The decision below was erroneous.

Accordingly we have re-stated the questions as follows:

QUESTIONS PRESENTED

I. Does the holding in the case of *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U. S. 525 (1958) preclude a Circuit Court, under Rule 52 (a) of the Federal Rules of Civil Procedure, from setting aside clearly erroneous findings of fact of the Trial Court or, under its general appellate power, from correcting conclusions of law which were derived from the application of incorrect standards to the facts as so determined?

II. Is there any conflict among the Circuits as to the interpretation of Rule 52 (a) of the Federal Rules of Civil Procedure which has any relevance to the issues presented in this case?

III. Was the Trial Court's power usurped by the Circuit Court in this case?

STATEMENT

At the time of the accident out of which this action arose, respondent, an electric utility, was engaged in the construction of an electrical generating plant and was operating, along with its employees, under the Workmen's Compensation Act of the State of South Carolina. It had previously contracted with Fairfield Engineering Company of Marion, Ohio, for the design and installation of a coal conveying system for this plant and Fairfield in turn had subcontracted the design of the control system of the coal handling equipment to Trans-Weigh, Inc.

Petitioner, an employee of Trans-Weigh, pursuant to written contract between Fairfield and Trans-Weigh, was sent by his employer to respondent's plant to calibrate the equipment in the control system and check out respondent's employees in its use. While so engaged he discovered that an integral component of this system, which had been purchased by Fairfield from another source, but which Trans-

Weigh, under its contract, had warranted to Fairfield to be compatible with the remaining equipment in the system, was, in fact, not compatible.

Petitioner attempted to remedy this condition by replacement of the offending part with one more suitable and while so engaged suffered his unfortunate accident. Thereafter petitioner instituted suit, based on negligence of respondent, to recover for the damages sustained as a result of the accident.

One of the respondent's defenses was that petitioner's remedy was restricted to recovery under the Workmen's Compensation Act of South Carolina. The District Judge, who tried the case without a jury, ruled that petitioner did not come within the provisions of the Workmen's Compensation Act, found against respondent on its other defenses, and rendered a judgment in the petitioner's favor in the amount of $75,000.00. (Judgment set forth in petitioner's Appendix, Page 13.) Thereupon respondent appealed to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals by its opinion (set forth in petitioner's Appendix, Page 20) reversed the District Court and remanded the case with directions to dismiss on the ground that petitioner was respondent's statutory employee and consequently that respondent's sole remedy was that provided by the Workmen's Compensation Act. The Court of Appeals did not pass upon the other grounds of appeal.

ARGUMENT

I

The holding in Byrd v. Blue Ridge Rural Electric Cooperative, 356 U. S. 525 (1958) was not disregarded by the Fourth Circuit Court of Appeals' decision in the instant case.

Rather than being in violation of *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U. S. 525 (1958), the Fourth Circuit's decision in the instant action is directly supported by it. This Court in *Byrd, supra*, expressly approved the Fourth Circuit's construction of the South Carolina Workmen's Compensation Act which that Court applied to the facts in this case in arriving at its manifestly correct decision.

The sole reason for this Court's reversal of *Blue Ridge Rural Electric Cooperative v. Byrd*, 238 F. (2d) 346 (4th Cir. 1956) was to allow the plaintiff the opportunity to introduce reply testimony as to the "statutory employment" question. That is not in issue here.

The *Byrd* decision also held that, although the South Carolina Supreme Court considered the question jurisdictional, and hence a legal one, under Federal procedure, facts relating to "statutory employment" were to be determined by the "finder of fact." It, however, did not restrict (as interpreted by petitioner) an appellate court's right, pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure, to set aside such findings where clearly erroneous or, under its general appellate power, to correct conclusions of law which were derived from the application of incorrect standards to the facts as so determined.

It was in the exercise of these undisputed appellate powers, rather than as an independent factual determination of the "statutory employment" question in violation

of the *Byrd* ruling, that the Circuit Court based its decision in this case, which in part is as follows:

> In reaching our decision we are not unmindful of that portion of Rule 52 (a) of the Federal Rules of Civil Procedure which provides that findings of fact in actions tried before the court without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." But that rule, by interpretation, is subject to exception and modification. In *United States v. Gypsum Co.*, 333 U. S. 364, 395 (1948), the Court held: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." We are left with that definite and firm conviction.
>
> However, our decision need not be bottomed solely upon this ground. Here the District Court premised its ultimate findings (that the construction of the McMeekin Station was not a part of the trade, business or occupation of the defendant, and that MacMullen was no more than a "casual employee" of defendant) on its interpretation of the standards to be applied. Because of the nature of the District Court's error, we are here reviewing primarily questions of law, namely, whether the District Court applied the proper standards to essentially undisputed facts. We are of the opinion that the ultimate findings and conclusions below, with which we disagree, were based on an erroneous interpretation and application of the law. *MacMullen v. South Carolina Electric & Gas Company*, 312 F. (2d) 662 (4th Cir. 1962); Petitioner's Appendix, Page 20, 33.

The soundness of the Circuit Court's decision is manifested by the application of the South Carolina Workmen's Compensation Act, as construed by the South Carolina Supreme Court, to the applicable facts.

As pointed out by the Circuit Court in this case (respondent's Appendix, Page 20, 21) it was established from the uncontroverted testimony introduced at the trial below that:

1. Respondent was engaged in the manufacture, transmission and sale of electricity.

2. It was empowered by its charter to construct electrical generating plants.

3. It had over the years steadily enlarged its electrical generating capacity to meet the increasing demands of its customers by constructing new plants.

4. It sold the electricity that it manufactured in its generating plants.

5. The respondent engaged no prime contractor in the construction of these plants but did some of the work itself with its own personnel and hired various contractors to do other portions of the work.

6. It engaged an engineering firm to do general engineering design work and to coordinate activities of respondent's personnel, which included not only laborers and craftsmen, but supervisory personnel as well, with the activities of the various contractors on the job.

A review of *Marchbanks v. Duke Power Company*, 190 S. C. 336, 2 S. E. (2d) 825 (1939); *Boseman v. Pacific Mills*, 193 S. C. 479, 8 S. E. (2d) 878 (1940); and *Bell v. South Carolina Electric & Gas Company*, 234 S. C. 577, 109 S. E. (2d) 441 (1959), as well as *Blue Ridge Rural Electric Co-operative v. Byrd*, 238 F. (2d) 346 (4th Cir. 1956), whose construction of the South Carolina Act was subsequently approved by this Court in *Byrd v. Blue Ridge Rural Electric Cooperative, supra*, in addition to the other cases cited in the decision of the Circuit Court in this case demonstrates conclusively that the above facts establish that the

respondent was engaged in the trade, business or occupation of constructing electrical generating plants within the contemplation of the South Carolina Workmen's Compensation Act. Furthermore, from such a review it is plain that the specific factual findings of the Trial Judge in Section 7 of the Findings of Fact of his Order in this case are in consonance with the result and do not support his ultimate conclusions of law to the contrary.

It is also established by documentary evidence that Trans-Weigh, petitioner's employer, was under a contractual obligation to:

1. Design and turn over to respondent a properly functioning control system for the coal handling equipment.

2. Furnish certain individual units of this system. As to the remaining units to be purchased by Fairfield from other sources, it warranted their compatibility with the other equipment.

3. Calibrate the system and instruct respondent's employees in its operation. *MacMullen v. South Carolina Electric & Gas Company*, 312 F. (2d) 662 (4th Cir. 1962); Petitioner's Appendix, Page 20, 30.

In addition, by petitioner's own testimony, he was, at the time of his injury, in the process of replacing a potentiometer in one of the control units of the coal handling system purchased by Fairfield from another source, but warranted to be compatible by Trans-Weigh, because he had found that it was not a proper design to work compatibly in the control system. Is is also uncontroverted that petitioner's employer, Trans-Weigh, rendered a bill to, and was paid by, Fairfield for petitioner's services while so engaged in the replacement of this part. Petitioner was, therefore, at the time of his accident, engaged in work that his employer, a sub-contractor of respondent, was under a contractual obligation to perform.

A review of applicable South Carolina authorities demonstrates that the above facts negate "casual employment" within the meaning of the Workmen's Compensation Act. *Smith v. Fulmer,* 198 S. C. 91, 15 S. E. (2d) 681 (1941); *Jolly v. Atlantic Greyhound,* 207 S. C. 1, 35 S. E. (2d) 42 (1945); *Benbow v. Edmunds High School,* 220 S. C. 363, 67 S. E. (2d) 680 (1951); *DeBerry v. Coker Freight Lines,* 234 S. C. 304, 108 S. E. (2d) 114 (1959). The Circuit Court, therefore, rather than improperly making unilateral findings of fact, as contended by petitioner, simply exercised the historic function of an appellate tribunal in correcting the errors of law committed by the Trial Court by applying proper legal standards to the uncontroverted facts. The Circuit Court has consequently committed no error which would justify this Court in granting petitioner the *Writ of Certiorari* prayed for herein.

II

There is no conflict among the Circuits as to the interpretation of Rule 52 (a) of the Federal Rules of Civil Procedure which has any relevance to the issues presented in this case.

The divergent views among the Circuits as to Rule 52 (a) of the Federal Rules of Civil Procedure, if such in fact exists, is not at issue here. The Court below in the instant case did not, upon consideration of the factual findings of the Trial Court, draw factual inferences different from those arrived at by the Trial Judge. The mere fact that the Trial Court labeled as findings of fact that:

> • • • plaintiff was not engaged in performing a part of the trade, business or occupation of the defendant; that the plaintiff was not a statutory employee of the defendant, and that his recovery and remedy are, therefore, not limited by the South Carolina Workmen's Compensation law."

does not alter the fact that they are conclusions of law rather than factual findings.

Whether respondent, by statutory definition, was engaged in the trade, business or occupation of constructing electrical generating plants and whether petitioner was or was not a casual employee within the meaning of the Act are not inferences for the finder of fact to derive from the testimony by reason of his "experience with the main springs of human conduct" but must be determined by the Court by applying to the factual findings legal standards set forth by the South Carolina Workmen's Compensation Act, and the cases construing the same. *Lundgren v. Freeman*, 307 F. (2d) 104 (9th Cir. 1962). The Court of Appeals was, therefore, free to act independently and draw its own legal conclusions and inferences upon application of proper standards to the "essentially undisputed facts." *United States v. Park, Davis & Company*, 362 U. S. 29 (1960); *Elyria-Lorain Broadcasting Company v. Lorain Journel*, 298 F. (2d) 356 (6th Cir. 1961).

A conflict, if any, among the Circuits as to the application of Rule 52 (a) of the Federal Rules of Civil Procedure, therefore, has no bearing on this controversy and, consequently, is not before this Court.

III

There was no usurpation of the functions of the District Court by the Circuit Court in this instance.

The Fourth Circuit Court of Appeals' actions in this case, as discussed above, were clearly within the approved scope of appellate review and, therefore, do not justify an intervention by way of a *Writ of Certiorari* by this Court.

CONCLUSION

For the foregoing reasons petitioner's application for a *Writ of Certiorari* should be denied.

Respectfully submitted,

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April 17, 1963.